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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket No. FTA-2016-0019]

Notice of Proposed Policy Statement on the Implementation of the Phased Increase in Domestic Content under the Buy America Waiver for Rolling Stock

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of proposed policy statement and request for comments.

SUMMARY: This notice proposes a statement of policy regarding the implementation of the phased increase in domestic content for rolling stock under the Federal Transit Administration's (FTA) Buy America statute., , as amended by the Fixing America's Surface Transportation (FAST) Act. The FAST Act was signed into law on December 4, 2015, with an effective date of October 1, 2015. FTA seeks comments from all interested parties. After consideration of the comments, FTA will issue a second Federal Register notice responding to comments and noting any changes made to the policy statement as a result of the comments received.

DATES: Comments must be received by **[INSERT DATE 30 DAYS AFTER PUBLICATION]**. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Please submit your comments by one of the following means, identifying your submissions by docket number FTA-2016-0019:

1. Web site: <http://www.regulations.gov>. Follow the instructions for submitting comments on the U.S. Government electronic docket site.

2. Fax: (202) 493-2251.

3. Mail: U.S. Department of Transportation, 1200 New Jersey Avenue, SE, Docket Operations, M-30, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001.

4. Hand Delivery: U.S. Department of Transportation, 1200 New Jersey Avenue, SE, Docket Operations, M-30, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must make reference to the “Federal Transit Administration” and include docket number FTA-2016-0019. Due to the security procedures in effect since October 2011, mail received through the U.S. Postal Service may be subject to delays. Parties making submissions responsive to this notice should consider using an express mail firm to ensure the prompt filing of any submissions not filed electronically or by hand. Note that all submissions received, including any personal information therein, will be posted without change or alteration to <http://www.regulations.gov>. For more information, you may review DOT’s complete Privacy Act Statement in the Federal Register published April 11, 2000 (65 FR 19477), or you may visit <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Cecelia Comito, Assistant Chief Counsel, Office of the Chief Counsel, phone: (202) 366-2217 or email, Cecelia.Comito@dot.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

The purpose of this notice is to propose a statement of policy that will clarify how to apply FTA's Buy America requirements to procurements for rolling stock with delivery dates or options in FY2018 through FY2020 and beyond. The FAST Act amended the rolling stock waiver in 49 U.S.C. 5323(j)(2)(C) to provide for a phased increase in the domestic content of rolling stock for FY2018-FY2019 and FY2020 and beyond:

(j) Buy America.

(1) In general. The Secretary may obligate an amount that may be appropriated to carry out this chapter for a project only if the steel, iron, and manufactured goods used in the project are produced in the United States.

(2) Waiver. The Secretary may waive paragraph (1) of this subsection if the Secretary finds that:

* * *

(C) when procuring rolling stock (including train control, communication, traction power equipment, and rolling stock prototypes) under this chapter

(i) the cost of components and subcomponents produced in the United States

(I) for fiscal years 2016 and 2017, is more than 60 percent of the cost of all components of the rolling stock;

(II) for fiscal years 2018 and 2019, is more than 65 percent of the cost of all components of the rolling stock; and

(III) for fiscal years 2020 and each fiscal year thereafter, is more than 70 percent of the cost of all components of the rolling stock; and

(ii) final assembly of the rolling stock has occurred in the United States...

Recipients may enter into rolling stock contracts under 49 U.S.C. 5325(e) for up to five years for buses and seven years for railcars. In FTA Circular 4220.1F, “Third Party Contracting Guidance,” FTA interpreted these five- and seven-year periods as covering the recipient’s “material requirements” for rolling stock and replacement needs from the first day when the contract becomes effective to its “material requirements” at the end of the fifth or seventh year, as applicable. FTA has not required that “the recipient must obtain delivery, acceptance, or even fabrication in five or seven years. Instead it means only that FTA limits a contract to purchasing no more than the recipient’s material requirements for rolling stock or replacement parts for five or seven years based on the effective date of the contract.” See FTA Circular 4220.1F, Chapter IV, page 23. Therefore, options for vehicles can be exercised within the five- or seven-year contract term, even if the vehicles will be delivered after the contract term.

Recipients have asked FTA to provide specific guidance on the applicability of the FAST Act’s new Buy America provisions to contracts entered into before or after October 1, 2015, the effective date of the FAST Act.

II. Proposed Policy

FTA's Buy America requirements focus on two points in time: (1) "when procuring rolling stock," which FTA interprets as the date of contracting; and (2) "the cost of components and subcomponents produced in the United States for fiscal years ...", which FTA interprets as the date of delivery of the vehicle.

Individual and Joint Procurements. FTA interprets the statute to require that if a recipient or group of recipients enter into a contract for rolling stock after the effective date of the FAST Act, i.e., October 1, 2015, then the new FAST Act provisions for the date of delivery of the rolling stock apply. Thus, for vehicles delivered in FY2018 and FY2019, the domestic content must be more than 65 percent, and for vehicles delivered in FY2020 and beyond, the domestic content must be more than 70 percent. These delivery provisions apply to contracts signed after the effective date of the FAST Act, i.e., October 1, 2015, unless a waiver is granted.

The FAST Act amendments do not apply to contracts entered into before the effective date of the FAST Act, i.e., October 1, 2015, even if the contract provides for the delivery of vehicles after FY2017. For contracts entered into before October 1, 2015, FTA proposes to continue to permit options to be exercised during the contract period even if the vehicles will be delivered outside the five- or seven-year contract term. Recipients who are not direct parties to a contract executed before October 1, 2015, however, may not exercise options (a/k/a "piggybacking") on such contracts and apply the lower domestic content requirement. The assignment of options to a third party results in the third party and the vendor entering into a new contract after the effective

date of the FAST Act, and therefore, the increased domestic content requirements for FY2018 and beyond will apply to vehicles delivered in those years.

State Purchasing Schedules. Some recipients purchase rolling stock from a State purchasing schedule. A State purchasing schedule is an arrangement that a State has established with multiple vendors in which those vendors agree to provide essentially an option to the State, and its subordinate governmental entities and others it might include in its programs, to acquire specific property or services in the future at established prices. Because the purchasing schedule does not commit the State to procuring a minimum number of vehicles, a “contract” does not exist until a State, recipient or sub-recipient enters into a purchase order with a vendor listed on the schedule.

Therefore, for purchase orders placed against State purchasing schedules before October 1, 2015, for the delivery of rolling stock in FY2018 and beyond, the increased domestic content requirements will not apply. For purchase orders placed against State schedules on or after October 1, 2015, for rolling stock that will be delivered in FY 2016 and 2017, the domestic content requirement must exceed 60%. For purchase orders placed against State schedules for rolling stock that will be delivered in FY 2018 and 2019, the domestic content must exceed 65%, and for purchase orders placed against State schedules for rolling stock that will be delivered in FY 2020 and beyond, the domestic content must exceed 70%.

FTA believes that this interpretation is consistent with the plain language of the statute, Congress’ directive to increase the domestic content for vehicles produced in FY2018 or later, and principles of statutory construction.

Calculation of Domestic Content. The FTA will adjust the calculation for determining whether a component is of domestic origin under 49 CFR 661.11 to accommodate the increase in domestic content for FY2018 and beyond. Currently under 49 CFR 661.11(g), “for a component to be of domestic origin, more than 60 percent of the subcomponents of that component, by cost, must be of domestic origin, and the manufacture of the component must take place in the United States. If, under the terms of this part, a component is determined to be of domestic origin, its entire cost may be used in calculating the cost of domestic content of an end product.”

Thus, for FY2018 and 2019, for a component to be of domestic content, more than 65 percent of the subcomponents of that component, by cost, must be of domestic origin, and for FY2020 and beyond, more than 70 percent of the subcomponents of the component must be of domestic content. The requirement that manufacture of the component take place in the United States still applies. Additionally, if a component is determined to be of domestic origin, its entire cost may be used in calculating the cost of content of an end product.

General Public Interest Waivers. FTA recognizes, however, that the FAST Act amendments to the rolling stock Buy America waiver may produce significant hardship for two categories of recipients and manufacturers: (1) recipients who entered into contracts or placed purchase orders against State schedules between October 1, 2015 and December 4, 2015; and (2) recipients who have entered into contracts after December 4, 2015, as a result of solicitations for bids or requests for proposals that were advertised before December 4, 2015.

Under 49 U.S.C. 5323(j)(2)(A), the Administrator may waive the Buy America requirements if the Administrator finds that applying the Buy America requirements would be inconsistent with the public interest. “In determining whether the conditions exist to grant a public interest waiver, the Administrator will consider all appropriate factors on a case-by-case basis ... When granting a public interest waiver, the Administrator shall issue a detailed written statement justifying why the waiver is in the public interest. The Administrator shall publish this justification in the Federal Register, providing the public with a reasonable time for notice and comment of not more than seven calendar days.” 49 CFR 661.7(b).

In a separate notice published in today’s Federal Register, FTA is seeking comment on a general public interest waiver. This public interest waiver is for the following categories of contracts: (1) for contracts entered into between the FAST Act’s effective date and date of enactment (i.e., between October 1, 2015 and December 4, 2015), the increased domestic content requirements for FY2018 and beyond will not apply, regardless of when the vehicles are delivered; and (2) for contracts entered into after December 4, 2015 as a result of solicitations for bids or requests for proposals that were advertised before December 4, 2015, the increased domestic content requirements for FY2018 and beyond will not apply, regardless of when the vehicles are delivered.

Recipients or vendors may apply to FTA for individual public interest waivers for contracts entered into after December 4, 2015, and others that do not fall within the scope of a general public interest waiver. A request for a public interest waiver should set forth the detailed justification for the proposed waiver, including information about the history of the procurement and the burden on the recipient and/or the industry in complying with

the FAST Act. Public interest waivers should be narrowly tailored and FTA will not generally look favorably on waivers that provide for contracts that include the exercise of options for vehicles that will be delivered beyond FY2020. FTA will act expeditiously on public interest waiver requests that provide the information requested.

FTA seeks comment from all interested parties on the above policy statement. After consideration of the comments, FTA will publish a second notice in the Federal Register with a response to comments and noting any changes made to the policy statement as a result of the comments received.

Therese McMillan,
Acting Administrator.

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